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The Law of the Sea Convention and U.S. Policy

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The Law of the Sea Convention and U.S. Policy

SUMMARY

On October 7, 1994, President Clinton transmitted to the Senate the 1982 United Nations Convention on the Law of the Sea and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention. The package was referred to the Senate Committee on Foreign Relations. On November 16, 1994, the U.N. Law of the Sea Convention entered into force but without accession by the United States. The 1994 Agreement entered into force on July 28, 1996, again without U.S. ratification.

The United States had provisional membership in the International Seabed Authority (ISA) and its organs and bodies through November 16, 1998. The opportunity for provisional membership, providing time for adherence to the convention and agreement, ended on November 16. Since the Senate had not given its advice and consent to U.S. adherence, the President could not bring those documents into force for the United States. Since November 16, 1998, the United States has observer status at the ISA.

The major part of the 1982 Law of the Sea Convention had been supported by U.S. Administrations, beginning with President Reagan, as fulfilling U.S. interests in having a comprehensive legal framework relating to competing uses of the world's oceans. However, the United States and many industrialized countries found some of the provisions relating to deep seabed mining in Part XI and Annexes III and IV of the Convention contrary to their interests and would not sign or act to ratify the Convention. Among the unacceptable elements were a decision-making process in the ISA Council and Assembly that would

not give the United States or other Western industrialized countries influence commensurate with their interests; "Review Conference" provisions that would allow Convention amendments to enter into force without express U.S. approval; stipulations relating to mandatory transfer of private technology; provisions that would deter rather than promote future development of deep seabed mineral resources by incorporating economic principles inconsistent with free market philosophy; and the absence of assured access to future deep seabed mineral resources. The Clinton Administration maintained that the provisions of the 1994 Agreement and Annex correct the objectionable elements in the Convention on deep seabed issues.

A number of questions face the Senate as it considers the Convention/Agreement package. Does the Agreement sufficiently resolve opposing concerns expressed above about the deep seabed mining provisions? Are the compulsory dispute settlement provisions and the U.S. declaration acceptable to the Senate? What is the impact of U.S. adherence on current U.S. statutes? What changes must be made by legislation? What precedent does U.S. acceptance of the Convention/Agreement definition of the common heritage of mankind concept establish? Were the provisional application procedures used for the 1994 Agreement a good or bad precedent for the U.S. treaty process? What is the nature of U.S. commitments undertaken in decisions of the ISA Council? Should Congress have a role and under what circumstances? What authority should Congress exert over the expenses of another international organization (the ISA)?

MOST RECENT DEVELOPMENTS

On September 20, 2004, the U.S. Commission on Ocean Policy, in its report to Congress and the President, recommended U.S. accession to the 1982 U.N. Law of the Sea Convention and 1994 Agreement. On December 17, 2004, the President's response to the Commission report urged "Congress to provide its advice and consent to this treaty as early as possible in the 109th Congress." The United States currently participates, as an observer, in meetings of the International Seabed Authority (ISA).

BACKGROUND AND ANALYSIS

The U.N. Convention on the Law of the Sea, which was open for signature between December 1982 and December 1984, established a legal regime governing activities on, over, and under the world's oceans. The Convention resulted from the third U.N. Conference on the Law of the Sea, which met for a total of 93 weeks between December 1973 and December 1982. The United States and other industrialized countries, however, while supporting most of the treaty, did not sign the Convention or announced they could not ratify the Convention without important changes to the parts that dealt with deep seabed resources beyond national jurisdiction. In 1990, U.N. Secretary-General Javier Perez de Cuellar initiated consultations among interested governments aimed at achieving universal participation in the Convention. From late 1992 on, pressures mounted to revise or amend what were viewed as unacceptable parts of the Convention. Factors contributing to this renewed pressure included the desire for universal participation in a convention that in most respects was acceptable worldwide, improvements in the international political climate, changes in economic ideology that meant greater acceptance of free market principles, and the steady increase in the number of ratifications toward the 60 required to bring the convention into force.

In April 1993, the Clinton Administration announced it would actively participate in these consultations on the outstanding issues in the deep seabed portions of the Convention. On November 16, 1993, receipt by the U.N. Secretary-General of the 60th instrument of ratification/accession marked the start of the one-year waiting period after which the Convention would enter into force. The consultations led to adoption, on July 28, 1994, by the U.N. General Assembly of Resolution 48/263 ([<http://www.un.org/documents/ga/res/48/a48r263.htm>]), opening for signature an Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea. The vote was 121 in favor (including the United States) to 0 against, with 7 abstentions (Colombia, Nicaragua, Panama, Peru, Russian Federation, Thailand, Venezuela) and 36 nations absent. The Agreement amended various seabed-related parts of the Convention.

On July 29, 1994, the United States signed that Agreement and on October 7, 1994, President Clinton transmitted to the Senate the 1982 U.N. Convention on the Law of the Sea and 1994 Agreement relating to the Implementation of Part XI of the U.N. Convention (Treaty Document 103-39, [<http://lugar.senate.gov/sfrc/presidentialmessage.pdf>]). The package was referred to the Senate Committee on Foreign Relations. On November 16,

1994, the U.N. Law of the Sea Convention entered into force and on July 28, 1996, the Agreement entered into force, both without U.S. participation.

On November 27, 2001, Ambassador Sichan Siv, U.S. Representative on the U.N. Economic and Social Council, made the following statement in the U.N. General Assembly:

The United States has long accepted the UN Convention on the Law of the Sea as embodying international law concerning traditional uses of the oceans. The United States played an important role in negotiating the Convention, as well as the 1994 Agreement that remedied the flaws in Part XI of the Convention on deep seabed mining. Because the rules of the Convention meet U.S. national security, economic, and environmental interests, I am pleased to inform you that the Administration of President George W. Bush supports accession of the United States to the Convention.

On April 8, 2002, in remarks at a U.N. meeting, U.S. ambassador Mary Beth West reiterated Administration support for U.S. accession to the Convention, noting “we intend to work with the U.S. Senate to move forward on becoming a party.” (USUN Press Release 49). During hearings before the Senate Foreign Relations Committee, in October 2003, Administration witnesses supported U.S. adherence to the treaty, maintaining that “becoming a party to the convention represents a highest priority of the United States international oceans policy.” (see Taft in S.Exec.Rept. 108-10, [<http://lugar.senate.gov/sfrc/seareport.pdf>], p. 91.)

On September 20, 2004, the U.S. Commission on Ocean Policy, in its report to the President and to Congress, issued 212 recommendations, placing U.S. accession to the U.N. Convention on the Law of the Sea as one of its 13 “Critical Actions...[to] provide the foundation for a comprehensive national ocean policy.” (See CRS Issue Brief IB10132, *Ocean Commissions: Ocean Policy Review and Outlook*, by John Justus, et al.) The Commission noted that “There are many compelling reasons for the United States to expeditiously accede to the Convention.” (See pp. 385-86 of Final Report, at [http://oceancommission.gov/documents/prepub_report/welcome.html].) The December 17, Presidential response to the Commission report stated that “as a matter of national security, economic self-interest, and international leadership, the Bush Administration is strongly committed to U.S. accession to the UN Convention on the Law of the Sea.”

As of January 31, 2005, 148 entities (146 independent States, the Cook Islands, and the European Community) were parties to the 1982 Convention. At the same time, 121 entities (including the Cook Islands) were parties to the 1994 Agreement. (The Cook Islands are a self-governing dependency of New Zealand, not an independent state.) Current information on status of the Convention and Agreement may be obtained on the Internet at [<http://www.un.org/Depts/los/index.htm>].

A primary issue in 2005 continues to be the lack of U.S. action. This country did not adhere to the convention/agreement package by November 16, 1998, and thus no longer participates as a member of the International Seabed Authority. The United States lost its seats in the four bodies of the ISA. Although the Foreign Relations Committee reported favorably the treaty package on February 25, 2004, it was not taken up by the Senate. Among the questions to be considered are the following: will the amendments offered in the Agreement sufficiently alter the direction of the Convention’s deep seabed mining provisions to make it acceptable to those who oppose U.S. ratification? What will be the Senate’s

response to the Administration's statements of support for U.S. accession because it meets "U.S. national security, economic, and environmental interests"? For details on the Committee's 2004 recommended resolution of advice and consent and other issues raised, see CRS Report RS21890, *The U.N. Law of the Sea Convention and the United States: Developments Since October 2003*, by Marjorie Ann Browne.

The Convention and U.S. Interests

The Law of the Sea Convention and the 1994 Agreement are extensive, complex documents touching on a wide range of policy issues and U.S. interests. From the perspective of the United States, some of the most significant areas addressed by the Convention deal with naval power and maritime commerce, coastal State interests, marine environment protection, marine scientific research, and international dispute settlement. The Agreement focuses on deep seabed mining issues, revising and nullifying key provisions of the Convention.

Naval Power and Maritime Commerce Interests. United States interests as a naval power provided the initial impetus for U.S. policymakers to promote law of the sea negotiations. The increasing number of claims made by other States over offshore high seas areas — such as territorial sea, fishing zones, economic zones — were expected to limit freedom of navigation to an unacceptable extent and increase the likelihood of international disputes over access to the world's oceans. The Convention sets a 12- nautical mile territorial sea limit and a 200-nautical mile exclusive economic zone (EEZ), thereby establishing limits to areas over which States may claim jurisdiction. Equally important for freedom of navigation, the Convention protects high seas freedoms throughout the zone and innocent passage through the territorial sea, so long as such activities are not "prejudicial to the peace, good order or security of the coastal State." The Convention lists 12 categories of activity viewed as non-innocent or prejudicial. Armed warships that do not engage in "prejudicial" activities are guaranteed the same right of innocent passage through the territorial sea as other ships. Submarine and other underwater craft are required, however, to navigate on the surface and show their flags.

The Convention further adopts an innovative concept — transit passage — for movement through straits used for international navigation that lie within the territorial seas of the adjoining States. Over 135 straits that may have been closed by the expansion of the territorial sea limit to 12 miles would be open to transit under this provision, benefiting both naval and commercial navigation. The United States conditioned its support of the 12-mile territorial sea limit on the inclusion of transit passage. Under this provision, all ships and aircraft may navigate or overfly for the purpose of continuous and expeditious transit of the strait. Since the Convention does not contain language specifically requiring submarines to surface, submarines may transit such straits submerged. States bordering straits may designate sea lanes and prescribe traffic separation schemes to promote safe passage of ships. All ships also have a right of innocent passage through archipelagic waters.

Opponents to U.S. adherence to the overall Convention argue that the United States already benefits from the Convention's navigational provisions, on the basis of customary international law. The United States has already declared a 12-mile territorial sea limit and a 200-mile EEZ and is exercising its rights through a Freedom of Navigation Program, using

diplomatic protests, operational challenges, and bilateral agreements to promote adherence to the naval and maritime obligations established in the Convention. It is therefore unnecessary, say some critics, to adhere to the Convention to protect these interests. Proponents of the Convention maintain that adherence is a more effective and less costly way of preserving the obligations and rights set forth in the Convention under naval power and maritime commerce interests.

Coastal State Interests. As a coastal State, the United States has required assurances of access to both living and non-living resources in the offshore areas. The 1945 Truman Proclamation, claiming U.S. jurisdiction over U.S. continental shelf resources, has been viewed as the initial salvo in the explosion of claims made by coastal States around the world extending territorial seas and fisheries and economic zones in the years since. During the early years of the Conference, U.S. congressional attention revolved around efforts to establish a 200-mile U.S. fisheries zone, as adopted in the 1976 Fishery Conservation and Management Act, while at the same time seeking, internationally, to respond to the concerns of U.S. long-distance fishers.

The Convention provides that each coastal State may claim a 200-mile EEZ, in which it has “sovereign rights” over exploring, exploiting, conserving, and managing the natural resources — whether living or non-living — of the waters superjacent to the sea- bed and its subsoil. In the EEZ, the coastal State also has jurisdiction to regulate the establishment and use of structures for economic purposes, marine scientific research, and protection of the marine environment, within the EEZ. Military activities, recognized as high seas uses, are permitted in the EEZ beyond the 12-mile territorial sea, but other States should have “due regard” for coastal State resource and other rights in the zone.

Protection of the Marine Environment. The world’s oceans cover nearly 71% of the earth’s surface, contain 97% of the world’s water, and produce one-third to one-half of the global oxygen. The Convention has been called “the strongest comprehensive environmental treaty now in existence.” (Stevenson and Oxman, *The Future of the United Nations Convention on the Law of the Sea*, p. 496.) Under the Convention, States are to take measures to deal with all sources of pollution of the marine environment: a) from land-based sources, from or through the atmosphere, or by dumping; b) from vessels; c) from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil; and d) from other installations or devices operating in the marine environment (Article 194).

For land-based sources, which account for 80% of marine pollution, the Convention requires States to adopt laws and regulations to prevent, reduce, and control such pollution, taking into account internationally agreed rules, standards, and recommended practices and procedures. Rather than rely solely on flag States for enforcement of vessel source pollution rules, the Convention charges coastal States and port States, as well as flag States, to act against vessels suspected of violation of anti-pollution regulations within territorial or EEZ waters. Coastal State regulations, especially within the EEZ, must be in accordance with generally accepted international standards, specifically under the International Maritime Organization (IMO). Compliance with environmental standards under the Convention is subject to compulsory arbitration or adjudication. According to two former U.S. negotiators, “the coupling of compulsory arbitration and adjudication with environmental obligations ...

is an ... advance over past practices." (Stevenson and Oxman, *The Future of the United Nations Convention on the Law of the Sea*, p. 495.)

Marine Scientific Research. The Convention grants the coastal State jurisdiction over marine scientific research conducted within its EEZ and on its continental shelf and requires coastal State consent for the conduct of such research. As a result, some claimed that the prospects for U.S. marine scientists to gain increased access to other nations' offshore areas — the location of some of the most useful marine scientific research — would be limited. The Convention, however, includes certain obligations on the coastal State that, under normal circumstances, will grant consent for research by other States or competent international organizations. Such consent may not be delayed or denied unreasonably. The Convention includes an "implied consent" rule to promote prompt coastal State responses to requests for consent. Under this rule, work on a marine scientific research project may proceed six months after detailed information on the project has been provided by the foreign State or international organization unless, within four months of receipt of the information, the coastal State has informed the research project that, 1) it has withheld consent; 2) the information provided does not conform with the facts; 3) additional information is required; or 4) outstanding obligations exist from previous research projects.

Dispute Settlement. A number of legal experts believe that U.S. interests in a stable law of the sea are strengthened by the comprehensive compulsory dispute settlement provisions in the Convention. According to Professor Louis Sohn, this was the first time that such a conference "agreed to provide for the access of individuals and corporations to an international tribunal in their disputes with a state or international organization." The goal of the Convention is to promote compliance with its provisions and ensure that disputes are settled by peaceful means. It provides for the settlement of disputes that may arise from the interpretation or application of the Convention; it also includes a supplementary system for the settlement of disputes arising under Part XI of the Convention relating to deep seabed mining. The underlying principle in the Convention is that parties to a dispute can select by agreement any dispute settlement procedure they desire.

Dispute Settlement Choices

The Convention names four potential fora for compulsory, binding dispute settlement: the International Tribunal for the Law of the Sea (Annex VI); the International Court of Justice; an arbitral tribunal (Annex VII); and a special arbitral tribunal (Annex VIII) for specified categories of disputes. A State may choose, by written declaration, one or more of these means. A State may opt out of one or more of the procedures or fora with respect to three categories of disputes: maritime boundary disputes; disputes concerning military activities and certain law enforcement activities; and disputes where the U.N. Security Council is exercising the functions assigned to it by the U.N. Charter.

The Seabed Disputes Chamber of the International Tribunal is the forum for disputes in the International Area where deep seabed mining might occur (Annex VII).

Compulsory dispute settlement, however, might be viewed as a two-edged sword. On the one hand, the United States may choose to use the process to resolve a particular dispute over application or interpretation of the Convention and thus force or encourage compliance with the Convention. On the other hand, other States might take the United States to the arbitral process over a dispute with U.S. interpretation or application of the Convention.

Part XI and the 1994 Agreement: Deep Seabed Mining

Sections of the Convention dealing with deep seabed mining include Part XI (The Area) and Annexes III (Basic Conditions of Prospecting, Exploration and Exploitation) and IV (Statute of the Enterprise). Part XI sets forth a regime and international organizational structure to regulate a future use of the international ocean area beyond national jurisdiction. While various mining consortia have invested in exploration activities and prototype technology for deep seabed mining, economic viability is not yet sufficient to warrant commercial recovery from deep seabed mining anytime soon. Thus, the international regime and institutions provided for in the Convention/Agreement package apply to an international activity not yet taking place.

The concept underlying the regime is called the “common heritage of mankind,” a phrase used by the Convention when referring to this area and its resources. Under this concept, no State may claim or exercise sovereignty or sovereign rights over any part of the area or its resources and all rights in the resources of the area are vested in mankind as a whole.

The International Seabed Authority (ISA), composed of all States parties to the Convention, may administer the seabed mining regime. The Convention establishes three principal organs of the Authority: the Assembly, Council, and Secretariat. The Assembly is the plenary body composed of all ISA members; it elects the Council and Secretary-General, assesses contributions, gives final approval to the rules and regulations of the Authority, approves the budget, and decides on sharing of mining revenues received by the Authority. The Council, made up of 36 members, is the executive body of the ISA and has primary responsibility for administering the regime.

As negotiations on the Convention were concluded and treaty language was finalized in the spring of 1982, the U.S. Administration decided that Part XI and Annexes III and IV were contrary to U.S. interests in many important ways:

- the **decisionmaking process of the ISA Council** and Assembly would not give the United States or other western industrialized countries influence commensurate with their interests;
- the “**Review Conference**” provisions would allow Convention amendments to enter into force without express U.S. approval;
- provisions required the mandatory **transfer of private technology**;
- some provisions would **deter** rather than promote future **development** of deep **seabed mineral resources** by incorporating economic principles inconsistent with free market philosophy;
- absent were guarantees for assured access to future qualified deep seabed mineral resources; and
- some provisions set undesirable precedents for international organizations.

As a result of consultations conducted by the U.N. Secretary-General since 1990, an agreement responding to the objections made by the United States and other industrialized countries was negotiated. The **1994 Agreement** relating to implementation of Part XI of the United Nations Convention, and its accompanying **Annex**, is considered an integral part of the Convention package that entered into force on November 16, 1994. In the event of

inconsistencies, the Agreement and Annex language take precedence over Convention language. The Annex contains the substantive changes to Part XI and Annexes III and IV of the Convention, while the Agreement defines the legal relationship between the Convention and Agreement, explains the ways in which States may consent to be bound by the Agreement, and sets the terms of entry into force of the Agreement and its provisional application.

A major concern of nations agreeing to international conventions in the 1990s is that newly created international bureaucracies be kept small and that costs be kept to a minimum. This is especially important for the ISA whose primary reason for existing — deep seabed mining — does not yet take place. The Annex begins by stating that the principle of cost-effectiveness shall govern all organs and subsidiary bodies, including the frequency, duration, and scheduling of meetings. The second principle stated in the Annex is that the establishment and functioning of the Authority shall be based on an evolutionary approach, taking into account the functional needs of the organs and bodies concerned.

Annex Sections

The Annex contains nine sections, each dealing with a separate set of Convention elements:

Sec. 1	Costs to States parties and institutional arrangements
Sec. 2	The Enterprise
Sec. 3	Decision-making
Sec. 4	Review Conference
Sec. 5	Transfer of Technology
Sec. 6	Production policy
Sec. 7	Economic assistance
Sec. 8	Financial terms of contract
Sec. 9	The Finance Committee

Application of these principles in the Annex can be illustrated with three examples. In keeping with the need to track closely the financial implications, the Annex sets up a 15-member Finance Committee, which must include representatives of the five largest financial contributing nations to the ISA administrative budget. This Committee will consider any financial or budgetary issues and, operating by consensus, make recommendations to the Council and Assembly. Second, the Annex provides that an Economic Planning Commission (EPC), set up by the Convention with functions that assumed mining was occurring, will not come into being until the Council decides so sometime in the future. The EPC functions were delegated in the interim to the Legal and Technical Commission, set up under the Convention. Finally, the Annex provided that the ISA would adopt the “rules, regulations and procedures necessary for the conduct of activities in the Area as they progress.” Such rules “shall take into account the terms of this Agreement, the prolonged delay in commercial deep seabed mining and the likely pace of activities in the Area.”

ISA Decisionmaking. Among the issues thought to be objectionable in the Convention, as originally adopted, was the lack of adequate influence by the United States and other industrialized countries over the decisions taken by the ISA Assembly and Council and the absence of language guaranteeing the United States a seat on the Council. The Annex provides that all substantive decisions of the Assembly shall be taken only upon recommendation of the Council and/or Finance Committee; if the Assembly does not accept the Council’s recommendation, the matter is returned to the Council for further consideration. The United States is now guaranteed a seat on the Council, in perpetuity. Further, the Annex changes the decision-making structure of the Council to ensure that industrialized States can make up a blocking vote.

Review Conference. Section 4 of the Annex eliminated the Review Conference language in the Convention, providing instead that States parties may decide to review the Convention at any time, rather than after 15 years, and that any amendments resulting from that review will be subject to the normal procedures for amendment set forth in the Convention. The special Review Conference language would have enabled entry into force for all parties of amendments after ratification by only three-fourths of the parties.

Technology Transfer. Section 5 of the Annex states that the mandatory technology transfer provisions in Article 5 of Annex III of the Convention “shall not apply.” Section 5 replaces those provisions with a set of general principles on the issue of technology transfer.

Obstacle to Development. Concerns that the Convention would deter rather than promote future development of deep seabed mineral resources and that assured access to mining by qualified entities would be denied are addressed in the Annex at Sections 2, 6, and 8, respectively, which

- terminates the provision on production limits of seabed-based mining in order to protect land-based production;
- replaces elaborate and expensive (including an annual fixed fee of \$1 million) financial terms of contract, with a set of principles, and reduces the \$500,000 application fee to \$250,000; and
- modifies Annex IV of the Convention so that the Enterprise would become operational only upon a decision of the Council. The Enterprise would be subject to the same obligations applicable to other miners, and the Enterprise would conduct its initial operation through joint ventures. The special privileges accorded to the Enterprise under the Convention are eliminated.

Adherence to the Agreement and the Convention

The Agreement was open for signature for a 12-month period, ending July 28, 1995. After that date, any ratification, formal confirmation of, or accession to the Convention is automatic consent to be bound by the Agreement. Since the Agreement’s purpose is to promote universal participation in the Convention, the Agreement used several ways to achieve consent to the Agreement. At the same time, consent language also had to respond to the legal requirements of the 60-plus States that had already ratified or acceded to the Convention as well as to those States that had not ratified or acceded to the Convention. The Agreement had to take effect as the Convention entered into force so as to maintain the integral link between the two. The link required use of provisional application as a procedure for operation of the Agreement.

The Agreement was applied provisionally between November 16, 1994 and July 28, 1996, when it entered into force. For each country, provisional application was “in accordance with ... national or internal laws and regulations.” Provisional application of the Agreement terminated when it entered into force on July 28, 1996. States that had not ratified the Agreement by July 28, could continue membership in the ISA on a provisional basis (1) through November 16, 1996, if they notified the U.N. of their intention to participate in the ISA as a member on a provisional basis; and (2) through November 16, 1998, if a request for extension of membership in ISA on a provisional basis beyond 1996 is approved by the ISA Council. Thereafter, if a provisional member fails to pay its assessed

contributions or to comply with its other obligations, its membership on a provisional basis shall be terminated (see Agreement, Annex, Section 1, para. 12).

The United States announced, when it signed the Agreement on July 29, 1994, that “it intends to apply the agreement provisionally. Provisional application by the United States will allow us to advance our seabed mining interests by participating in the International Seabed Authority from the outset to ensure that the implementation of the regime is consistent with those interests.” On July 17, 1996, the United States notified the U.N. of “its intention...to continue to participate as a Member of the International Seabed Authority on a provisional basis....” This notification was followed by a U.S. request to the ISA Council for an extension of its provisional membership in the Authority until November 16, 1998. The diplomatic note continued, “The United States wishes to inform the Council and the Authority that it will continue to make good faith efforts to become a Party to the Agreement and the Convention.”

Issues for the Senate

A number of issues may arise during any Senate consideration of the 1982 Convention. Fundamental is the question of whether the 1994 Agreement “fixes” the deep seabed portions of the Convention that were at the core of opposition to the original document. Other issues likely to draw Senate attention include:

- the dispute settlement process set forth in the Convention and the U.S. declarations on dispute settlement;
- the relationship between U.S. law and various parts of the Convention regarding use of the world’s oceans;
- U.S. acceptance of the Convention/Agreement interpretation and application of the common heritage of mankind concept;
- the provisional application procedures as a precedent in the U.S. treaty process;
- the nature of U.S. commitments undertaken by a decision of the ISA Council: what does a Council decision commit the U.S. government to do;
- should Congress have a role and if so, under what circumstances? and the cost and financing of the ISA and U.S. participation therein, now and in the future.

Is the Convention Really “Fixed”? The Clinton Administration maintained that the Agreement eliminates or modifies the institutional and economic and commercial objections of the United States and other industrialized nations to the Convention’s deep seabed provisions. The burden of proof that the Convention is “fixed” would appear to reside with the Administration and with those like-minded experts from the various interest groups affected by the Convention. The Clinton Administration suggested that only active U.S. participation in the Convention/Agreement and in the organs and bodies established by them would ensure that the protections and understandings established by the Agreement/Annex are applied and strengthened.

Some critics, however, still contend that the Convention is not “fixed,” especially to the extent it still represents a “giveaway” to developing nations. In countering this view, proponents would cite a number of changes made in the Agreement:

- financing of Enterprise mining efforts would no longer be subsidized by mining States;
- specific mandatory requirements for transfer of technology to the Enterprise or to developing nations have been removed;
- specific requirements protecting land-based minerals producers (mostly developing countries) are no longer applicable; and
- onerous fees for mining by non-Enterprise entities are no longer required.

Opponents, however, would point to other provisions that remain. For example, the Convention contains language directing that, as a matter of policy, activities in the international Area should take into “particular” consideration the interests and needs of developing States (Article 140, para. 1). Article 140 of the Convention urges promoting the participation of developing States in activities in the Area. Article 150, on policies relating to activities in the Area, seeks to ensure the expansion of opportunities for participation in deep seabed mining, participation in revenues by the Authority and the transfer of technology to the Enterprise and developing States, and protection of developing countries from adverse effects on their economies (Article 150 (c), (d), (g), and (h)). Section 5, para. 1(b) of the Agreement urges contractors and their respective sponsoring States to cooperate with the ISA in facilitating access to technology by the Enterprise or its joint venture, or by the developing State. In addition, the Agreement provides for establishment of an economic assistance fund for those developing countries suffering serious adverse effects to their land-based production of minerals due to seabed mining operations (Section 7). Opponents argue that the combined effect of these provisions is to preserve a special status for developing States, at the expense of the United States and other industrialized nations and their companies.

Compulsory Dispute Settlement. The Senate has sometimes been reluctant to accept broad compulsory dispute settlement language in treaties pending before it. For example, after nearly 15 years of off-and-on debate, the Senate, in 1935, rejected U.S. adherence to the 1920 Statute of the Permanent Court of International Justice (PCIJ), the judicial arm of the League of Nations. In 1946, when the Senate gave its advice and consent to U.S. ratification of the Statute of the International Court of Justice (ICJ) and acceptance of the compulsory jurisdiction of the Court (under Article 36, paragraph 2 of the Statute), it added the words “as determined by the United States” (the Connally reservation) to indicate the United States would determine whether a question was within its domestic jurisdiction and thus beyond the jurisdiction of the World Court. (This Article 36 declaration was withdrawn, effective April 1986, by the executive branch.) In May 1960, the Senate considered the four 1958 Law of the Sea Conventions and an Optional Protocol providing for the compulsory jurisdiction of the ICJ in disputes over the interpretation or application of the conventions. The Senate rejected the Optional Protocol.

This concern that the United States maintain control over what actions might be taken against it, internationally, was reenforced during the last months of 1994, during congressional consideration of the Uruguay Round GATT agreements, the World Trade Organization, and its dispute settlement procedures. As a potential complaining party, the United States wanted a strengthened and expedited process; however, as a potential subject

of a complaint, the United States wanted to protect its sovereign control over its own enacted laws and interests.

The 1982 Law of the Sea Convention was, in 1982, considered unusual in international law for providing a comprehensive compulsory dispute settlement system. At the same time, the system's flexibility of fora available for States parties to use makes it more acceptable to the United States. The Administration recommended submitting a written declaration choosing special arbitration under Annex VIII as the means for settling disputes concerning the interpretation or application of the Convention relating to fisheries, protection and preservation of the marine environment, marine scientific research, and navigation, including pollution from vessels and by dumping. Under Annex VIII, each party to the dispute appoints two members of a special five-member arbitral tribunal and the parties to the dispute agree to the fifth member of the tribunal who serves as President. For disputes not covered by Annex VIII, the Administration recommended acceptance of an arbitral tribunal under Annex VII, that provides that each party to the dispute appoint one member of a five-person arbitral tribunal and that the remaining three be appointed by agreement between the disputants. In both these options, the United States would have some flexibility in determining those involved as tribunal members.

The Administration also recommended the United States opt out of the three binding dispute settlement procedures where exclusion is permissible: disputes concerning maritime boundaries between neighboring States, disputes concerning military activities and certain law enforcement activities, and disputes under consideration by the U.N. Security Council, under the U.N. Charter. The Administration seems to have recognized the tendency of the Senate to protect what it considered as encroachments over U.S. sovereignty by recommending a course of action that would give the United States the greatest degree of flexibility in accepting compulsory dispute settlement.

Convention and U.S. Law. In the interim period between 1994 and 2003, questions concerning the relationship between the various parts of the Convention and the body of current U.S. law appear to have been worked out. Two pieces of legislation — the Fishery Conservation and Management Act and the Deep Seabed Hard Mineral Resources Act — had been enacted as interim measures prior to entry into force of a Law of the Sea Convention. Secretary of State Warren Christopher, in his 1994 letter to the President, noted that “the Department, along with other concerned agencies, stands ready to work with Congress toward enactment of legislation necessary to carry out the obligations assumed under the Convention and Agreement and to permit the United States to exercise rights granted by the Convention” (Treaty Document 103-39, [<http://lugar.senate.gov/sfrc/presidentialmessage.pdf>], p. xi). Correspondence from Secretary Christopher to the Committee in 1996 indicated that a review of existing laws had led to a “determination that implementing legislation is not necessary before United States accession.” In October 2003, the State Department’s Legal Adviser, William Taft, stated that that circumstance had not changed (S.Exec.Rept. 108-10, [<http://lugar.senate.gov/sfrc/seareport.pdf>], p. 176 and p. 22).

Common Heritage. If it becomes a party to the Convention, the United States accepts that “The Area and its resources are the common heritage of mankind.” At issue is how the Convention, as modified by the Agreement, defines and interprets that concept, as applied against the deep seabed beyond national jurisdiction. The State Department position is that “the Agreement, by restructuring the seabed mining regime along free market lines,

endorses the consistent view of the United States that the common heritage principle fully comports with private economic activity in accordance with market principles" (Treaty Document 103-39, [<http://lugar.senate.gov/sfrc/presidentialmessage.pdf>], p. 61). Opponents to the Convention, in particular deep seabed mining interests, might argue that in the absence of a complete restructuring of Part XI to eliminate the Enterprise and even, perhaps, the Authority, mining under the common heritage concept as defined in the Convention/Agreement package is still impossible.

Provisional Application. Provisional application is a major vehicle for the incorporation of the Agreement into the Convention package and for the Agreement's operation pending its entry into force. While provisional application is not a new procedure, it is not commonly used. Article 25 of the 1969 Vienna Convention on the Law of Treaties recognizes the procedure. A 2001 Senate study observes,

In the United States, provisional application of a treaty may be subject to question especially if it gives temporary effect to a treaty prior to its receiving the advice and consent of the Senate. An agreement to apply a treaty provisionally is in essence an executive agreement to undertake temporarily what the treaty may call for permanently. (*Treaties and Other International Agreements: The Role of the United States Senate*, S.Prt. 106-71, [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_senate_print&docid=f:66922.pdf], 2001, pp. 113-114.)

Thus, provisional application of the agreement and U.S. participation in the International Seabed Authority, including the funding for such participation, might be viewed as bypassing or circumventing the role of the Senate in giving its advice and consent to U.S. adherence to a treaty.

Opponents have cited the provisional application process in this instance as one through which the United States has "committed ... to the terms of the Law of the Sea Treaty for up to four years — even if the Senate never ratifies the Treaty. This may violate the State Department Basic Authorities Act of 1956 (22 U.S.C. § 2672)." (Representative Fields, *Current Status of the Convention on the Law of the Sea*, Hearings, August 11, 1994, p. 5.) The State Department cites Section 5(a) of the same Act, as amended, as authorizing U.S. participation in "international activities ... for which provision has not been made by ... treaty", with the proviso that such authority is not granted for more than one year without approval of Congress. The Department further states that section 5(a) "has been construed to allow participation on a provisional basis in succeeding years if the Congress approves a budget submission containing a line item covering the activity in question for each such year."

Commitments. An issue raised in Congress, and particularly in the Senate, revolves around the extent to which U.S. participation in a decision of a U.N. body — in this case the U.N. Security Council and its votes on U.N. peacekeeping — might commit the United States to expend funds and provide personnel for an action not approved by Congress. Some in Congress might want to institute consultations and reporting requirements on the decisions taken in the International Seabed Authority and its organs and bodies, especially its Council.

Funding. Another vehicle for congressional tracking of the International Seabed Authority and the operation of the Convention/Agreement deep seabed regime is through

funding the U.S. contribution to the ISA. U.S. policy between December 1982 and Fiscal Year 1994 was to withhold the proportionate (25%) share of the U.N. regular budget that financed the cost of the Preparatory Commission (PrepComm) and Secretariat support for the PrepComm. If the overall cost of Convention implementation remains modest, as seems to be the intent in the Agreement/Annex, Section 1, funding a future U.S. contribution might not be onerous. Any significant increases might signal increases in bureaucracy and infrastructure that Congress might wish to investigate or at least question the executive branch.

The cost of Convention implementation, including the ISA, was budgeted at \$776,000 for the period November 16, 1994-December 31, 1995. The ISA budgets for 1996 and 1997 were funded from the U.N. regular budget. The 1998 budget of \$4.7 million was the first to be financed from the assessed contributions of its members, including any provisional ISA members. Congress did not provide the \$1,225,000 requested for FY1998, for calendar 1998 assessments, on the basis that the United States had not adhered to the convention. On September 14, 1998, the State Department submitted to Congress a reprogramming request for the transfer of \$1,224,975 in FY1998 funds from the State Department Contributions to International Organizations (CIO) account to the Diplomatic and Consular Programs account. The chairman of the House State Department Appropriations subcommittee, on September 27, 1998, rejected this request on the grounds that "it is difficult to rationalize payment of funds for provisional membership in an organization in which the U.S. is not likely to become a member." The Administration was unsuccessful in its request of \$1.5 million for 1999 calendar year assessments in the FY1999 State Department budget submission and did not include funds in its future requests. However, the U.S. contribution for calendar year 1998 assessments was paid to the ISA in September 2002.

During testimony in October 2003, State Department officials indicated that the annual U.S. contributions to the Convention's institutions would be "about three million dollars, paid to the Law of the Sea Tribunal and the International Seabed Authority from the ... Department's Contributions to International Organizations account." Legal Adviser William H. Taft specified that the U.S. contribution to the 2003-2004 biennial budget of the ISA would be "just over \$1 million" and the 2004 assessment for the International Tribunal would be "a little less than \$2 million (24% of the total budget) and 22% of the total for the 2005-2006 budget years." (S. Exec. Rept. 108-10, [<http://lugar.senate.gov/sfrc/seareport.pdf>], pp. 86, 94)

Since the Senate did not give its advice and consent to U.S. adherence to the Convention/Agreement package, the United States did not ratify or accede to the treaty before November 16, 1998. On that date, when provisional membership ended, the United States became an Observer state to the Authority. This meant loss of the seats it held on the ISA Council, Legal and Technical Commission, and Finance Committee, as well as the Assembly. These were seats secured as a result of the 1994 Agreement amendments and considered among the major issues of U.S. concern regarding the Convention. When the ISA convened in August 1999, Italy was elected to replace the United States on the Council.

CONGRESSIONAL HEARINGS, REPORTS, AND DOCUMENTS

U.S. Congress. Senate. Committee on Foreign Relations. *Current Status of the Convention on the Law of the Sea*. Hearing, 103rd Congress, 2nd session. August 11, 1994. Washington, U.S. Govt. Print. Off., 1994. 94 p. (Hearing, Senate, 103rd Congress, 2nd session, S.Hrg. 103-737.)

U.S. Congress. Senate. Committee on Foreign Relations. *United Nations Convention on the Law of the Sea*. March 11, 2004. Washington, U.S. Govt. Print., 2004. 187 p. (S.Exec.Rept. 108-10, [<http://lugar.senate.gov/sfrc/seareport.pdf>], 108th Congress, 2nd session.) [Hearings included]

CHRONOLOGY

- 06/08/04** — The Senate Select Committee on Intelligence held a hearing on the Law of the Sea Convention.
- 05/12/04** — The House International Relations Committee held hearings on the U.N. Convention on the Law of the Sea.
- 03/23/04** — The Senate Environment and Public Works Committee held hearings on the Law of the Sea Convention.
- 04/08/04** — The Senate Armed Services Committee held hearings on the military implications of the U.N. Law of the Sea Convention.
- 10/14 & 21/03** — The Senate Foreign Relations Committee held hearings on the Law of the Sea Convention package, Treaty Document 103-39, [<http://lugar.senate.gov/sfrc/presidentialmessage.pdf>].
- 09/02/99** — President Clinton signed a proclamation expanding the U.S. contiguous zone from 12 to 24 nautical miles, thereby increasing the area within which U.S. authorities can enforce customs, fiscal, immigration, and sanitary laws and regulations.
- 05/05/98** — Four Senators (John McCain, Olympia Snowe, John Chafee, and Frank H. Murkowski) in a letter to Chairman Jesse Helms “urged favorable consideration of the Convention on the Law of the Sea by the Senate Committee on Foreign Relations as soon as possible.”
- 10/01/96** — The International Tribunal for the Law of the Sea became operational, with the 21 judges being formally sworn in on October 18, 1996.
- 07/28/96** — The 1994 Agreement entered into force.

06/00/96 — The International Seabed Authority became fully operational, having come into existence on November 16, 1994.

10/07/94 — President Clinton sent Convention/Agreement package to the Senate (Treaty Doc. 103-39).

07/29/94 — The United States signed the 1994 Agreement relating to the Implementation of Part XI of the U.N. Convention on the Law of the Sea.

11/16/93 — The 60th instrument of ratification was received by the United Nations, thereby triggering entry into force one year later.

12/27/86 — President Reagan extended the U.S. territorial sea from three to 12 nautical miles.

03/10/83 — President Reagan established a U.S. Exclusive Economic Zone extending 200 nautical miles beyond the coasts and issued an oceans policy statement relating to the United States and the U.N. Convention.

12/10/82 — The U.N. Convention on the Law of the Sea was opened for signature until December 9, 1984, and signed by 119 entities. The United States signed only the Final Act of the Conference.

04/30/82 — The Conference voted 130 in favor and 4 (Israel, Turkey, United States, and Venezuela) against, with 17 abstentions, to adopt the Convention.

12/03/73 — First session of the Third U.N. Conference on the Law of the Sea convened, starting a process that ended nine years later, on December 10, 1982.

FOR ADDITIONAL READING

Charney, Jonathan I. "The Marine Environment and the 1982 United Nations Convention on the Law of the Sea." *The International Lawyer*, v. 28, Winter 1994: 879-901.

CRS Report RS21894, *Law of the Sea Convention: The International Seabed Authority and Other Convention Bodies: Current Status and U.S. Participation Therein*, by Marjorie Ann Browne.

The Convention on the Law of the Sea; Oceans Conference, Monterey, California; June 1998. [Fourteen papers by a number of Federal agencies] On the State Department Internet site at [http://www.state.gov/www/global/oes/oceans/980610_los.html].

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Stephens, Dale G. “The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations.” *California Western International Law Journal*, v. 29 1999: 283-311.

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